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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHARLES GALBREATH

PETITIONER

vs.

ROBERT C. HARRIS, and wife
FRANCES A. HARRIS

RESPONDENTS

Petition for Writ of Certiorari
to the Tennessee
Court of Appeals

PETITION FOR WRIT OF CERTIORARI

CHARLES GALBREATH
901 STAHLMAN BUILDING
NASHVILLE, TN 37201
(615) 244-0749

QUESTIONS PRESENTED FOR REVIEW

1.] Does due process require rulings of courts to be based on reasonable interpretation of controlling facts and conclusions of law?

2.] May a court, in conformity with due process, render a decision in direct conflict with settled law without articulating a reason for departure from or overruling established and controlling precedent?

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OPINIONS BELOW

Application for permission to appeal from the decision of the Tennessee Court of Appeals was denied by the Tennessee Supreme Court by order entered on the 8th day of April, 1991. Two opinions were entered by the Court of Appeals, one on the 6th day of September, 1989, reported at 779 S.W.2d 392 (Tenn. App. 1989) and the other on the 7th day of November, 1990, unreported. The opinions of the Court of Appeals and the final order of the Supreme Court are set out in the APPENDIX.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

This case seeks adjudication of rights under the due process clause of the XIV Amendment to the United States Constitution.

STATEMENT OF THE CASE

Suit was brought to enforce the payment of rents under an amended lease contract governed by the statute of frauds. The defendant contended that the parties had orally agreed the obligation to pay rent that had accrued for nineteen months prior to cancellation of the lease did not have to be met. The plaintiff denied such a modification of the lease. The trial judge held that the cancellation of the lease terminated the obligation to pay

rent that had accrued and the Court of Appeals reversed, declaring:

> "There is a distinction between rents "to accrue" and "accrued rents." 49 Am.Jur.2d Landlord & Tenant §515 (1970). "Generally, liability for future rent under a lease is extinguished by cancellation of the lease, as where the lease is cancelled in legal proceedings or by mutual agreement of the parties. However, the tenant remains liable for rent due or accruing before the cancellation becomes effective." 52 C.J.S. Landlord & Tenant §491 (1968) (footnotes omitted). Galbreath v. Harris, supra 779 S.W.2d at 392.

On remand the defendant Robert Harris, over objection, testified that when the lease was cancelled the plaintiff agreed he would not owe for deferred rent that had accrued for nineteen months because the parties had decided to end a rather involved business relationship that had extended for many years. The plaintiff disputed

this testimony and pointed out that he had continued to have business relations with the defendant involving litigation in the same trial court years after the defendant claimed they no longer had anything to do with one another personally or financially.

In spite of the ruling of the Court of Appeals to the contrary, the trial judge again held that there was no obligation to pay rent that both parties agreed had accrued prior to cancellation and that the evidence, presented by oral testimony, supported the defendant's contention that the obligation to pay the rent, if it had accrued, had been cancelled by oral agreement of the parties.

On appeal, the decision of the trial court was affirmed, it being

specifically held that "(T)he court properly allowed the parole evidence to show the modification." Support for this ruling was by reference to 17 Am.Jur.2d Contracts §466 and Co-operative Stores Co. v. United Fidelity Guaranty Co., 137 Tenn. 609, 622, 196 S.S. 177, 180 (1917) and V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., Inc., 595 S.W. 2d 474, 482 (Tenn. 1980). These authorities did not deal with the statute of frauds.

Plaintiff's application for permission to appeal was denied by the Tennessee Supreme Court on the 8th day of April, 1991, without comment on the due process issue that was presented in substantially the same manner as in this petition.

ARGUMENT

The law in Tennessee is in direct conflict with the holding of the Courts of Tennessee in this case. All of the authorities relied on in the opinion quoted from next above dealt with simple contracts, not contracts entered into under the provisions of the statute of frauds. The settled law in Tennessee is:

> "A written instrument within the statute of frauds may be reformed only by a written instrument." Pierce v. Flynn, 656 S.W.2d 42 (Tenn.App. 1983).
>
> "An agreement to reduce the rent provided for in a lease must, under the statute of frauds, be in writing." 37 C.J.S. §115 Statute of Frauds.

While recognizing that the Supreme Court does not sit for the correction of errors and that great deference is afforded interpretations by lower courts

familiar with the laws of the state involved, this Court has indicated that it would intervene if it appeared the determination of the state law issue was so unreasonable as to violate due process. As noted in Prosser v. Clark, 69 S.Ct. 1333 (1984), "In dealing with issues of state law that enter into judgments. . .we are hesitant to overrule. . .unless the. . .conclusions are shown to be unreasonable."

Nothing can be more unreasonable than for a court to decide a case contrary to settled law without explanation for no apparent reason. As Lord Coke observed, "The reason for the law is the soul of the law." Without reason for decisions judicial tyranny is an ever present danger.

The ruling of the appellate courts

of Tennessee in this case deprives the plaintiff of property rights without affording him due process of law. The opinion fails to give a factually correct or accepted legal basis for its ruling that a disputed modification of a contract governed by the statute of frauds may be proved by parole evidence admitted over objection. Instead, the Court of Appeals incorrectly cites inapplicable authority in support of its holding. In citing authority for the proposition that a contract may be modified by parole providing the contract is not within the statute of frauds the Courts below apparently overlooked the controlling fact that the contract in this case is governed by the statute.

The misplaced and contradictory

authorities cited in support of the conclusion they oppose (V.L. Nicholson Co. v. Transcon Inv. and Fin. Ltd., Inc., 595 S.W.2d 474, 482 (Tenn. 1980), Co-operative Stores v. United States Fidelity and Casualty Guaranty Co., 137 Tenn. 609, 622, 195 S.W. 177, 180 (1917), and 17 Am.Jur.2d Contracts §466 (1964), supra, deal with simple contracts, not contracts falling within strict statutory rules as does the one in this case. As the quotation from Am.Jur. instructs, "(B)y the rules of the common law, it is competent for the parties to a simple contract in writing. . .to. . .modify it. . .and in the absence of a statute changing the rule. . .the written contract may be changed. . .in whole or in part by a subsequent one, written, oral, or implied. . ."

(emphasis supplied). The unmistakable meaning of this language is that conflicts governed by statute may not be so simply modified. We do not deal in this case with a simple contract or the rules of the common law. The same section of Am.Jur.2d reiterates, "Parties to an unsealed executory contract, not within the statute of frauds, may change it by mutual consent" (again, emphasis supplied). This plainly means the contract in this case could not be so changed. It has been the consistent position of the plaintiff, indeed undenied by defendants, that the contract in this case is governed by statute, not common law.

For an appellate court to cite and rely on law contrary to its holding as

supportive and controlling is an unreasonable exercise of judicial power.

> "Fundamental purpose of due process is to allow aggrieved party the opportunity to present his case and have its merits fairly judged." Okeson v. Tolley School Dis. No. 25, 260 F2 864, reversed 266 F2 378.
>
> "Purpose of due process is to protect the individual from arbitrary action of government." People v. Becker, 459 N.E.2d 672 (Ill. 1984).
>
> "It is not guaranteed that the opportunity to be heard will be conducted entirely free from error, but rather provides a procedure for review and correction of such error as may occur." Grant, Schon, Wisen v. R.W. Borrowdale Co., 448 N.E.2 674 (1983).

Where no reason is given sustainable under the law of Tennessee to support a holding contrary to settled law such holding is unreasonable, per se.

Due process, unlike prayer, involves not only the right to be heard but the right to a reasonable answer. The basic rights to due process delineated by this Court in Wisconsin v. Constantineau, 91 S.Ct. 507 (1971) includes "notice and an opportunity to be heard" are completely frustrated absent the even more fundamental and essential right to a reasonable answer based on law and fact. If there is a basis for the Court of Appeals and the trial court's ruling that alterations of contracts under the statute of frauds may be proved by parole evidence it would be minimal adherance to justice and fairness to disclose it. To rule arbitrarily without reason cannot be said to comport with due process.

> "Principles of due process under the Tennessee Constitution are identical to those under the United States Constitution". Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. 1982).

The plaintiff was deprived of property rights valued at some $20,000.00 because the Chancellor opted to believe the defendant's unsupported testimony; refuted by the written words in the contract which lawfully could not be modified except in writing. The testimony of the defendant was objected to and disputed by the plaintiff, an attorney and retired appeals judge, bolstering the protection afforded the contract by legislative adoption of the statute of frauds. Neither the Chancellor nor the Court of Appeals, nor any other source including counsel for the defendant, has cited accurately

existing binding legal authority in support of this deprivation. The very purpose of the statute of frauds is to protect individuals from such procedural lack of due process.

> "The purpose of the Statute of Frauds is to prevent fraudulent contracts from being established by perjured testimony." Yates v. Skaggs, 187 Tenn. 149, 213 S.W.2d 41 (1948).
>
> "The purpose of the Statute of Frauds is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other." Baliles v. Cities Service Co., 578 S.W.2d 621 (Tenn. 1919).

It is conceivable that the plaintiff did perjure himself when he denied any oral change in the obligation exisitng at the time the contract ended for payment by the defendant of rents that had accrued for some nineteen months. If so, he should be subjected

to the consequences of such utter disregard of obligations due the courts by a member of the bar. But under prevailing law he could not, absent fraud in the adducement of the contract itself, be deprived of the benefits due under the contract, which could only be lost by written agreement signed by him. The only purpose and sole reason for the statute of frauds is to relieve courts of the burden of determining who is truthful in such dispute by simply looking to the written document itself. No lawful judicial power exists to set aside the contractual obligations of the defendant entered into and protected under the provisions of the statute of frauds.

> "A court has no power to relieve against the express

> provisions of a statute. It follows, therefore, that no parole proof can be received to prove a contract required by the provisions of a statute to be in writing. No exceptions have been made by the Legislature, and this court, without usurping legislative power, can make none." Patton v. McClure, 8 Tenn. 333.

The Trial Court and the Court of Appeals has made such an exception.

Due process, as noted by this Court in Grant, supra, is not withheld so long as it "provides a procedure for review of such errors as may occur". In this case, due process was withheld by the Tennessee Supreme Court's refusal to review the denial of the protection of settled law by the lower courts.

CONCLUSION

Soon after ratification of the 14th

Amendment the Supreme Court in explaining the meaning of due process noted:

> "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt as to their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution - that is the law of its creation - to pass upon the subject matter of the suit. . ." Pennoyer v. Neff, 95 US 714, 24 L.Ed 565 (1871).

To this point the subject matter of this suit, the right of a party to enforce a contract governed by the statute of frauds against a party bound

by its terms claiming orally that he has been discharged, has not been passed upon.

Basic fairness suggests that someone to whom this due process question has been presented in this case, counsel for defendants, the trial judge, the Tennessee Court of Appeals or the Tennessee Supreme Court should have at least discussed the issue. To date none have. It is accordingly, respectfully urged that the due process question be remanded to the Tennessee Supreme Court for determination. As this Court has held:

> "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigations." Kremer v. Chemical Const. Corp., 102 S.Ct. 1883 (1982).

No redetermination of the issue is possible in this case since there has been no determination to reconsider. This fact makes even more appropriate that remand issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was mailed to Gail Pigg, Attorney for Defendants, 219 Second Avenue, North, Nashville, TN 37201 on this 26th day of August, 1991.

CHARLES GALBREATH

APPENDIX A

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

NO. 89-156-II
DAVIDSON EQUITY

CHARLES GALBREATH
Plaintiff-Appellant

v.

ROBERT C. HARRIS and wife
FRANCES A. HARRIS
Defendants-Appellees

OPINION
[Filed Sept. 6, 1989]

Plaintiff Charles Galbreath appeals the trial court's order granting the defendants' summary judgment motion.

The pertinent facts are as follows:

Mr. Galbreath owned a one-half interest and defendants, Robert Harris and wife Frances Harris, owned a one-half interest in two parcels of real estate. Each parcel was developed for

use as a car wash.

On 29 March 1977, the parties entered into a ten-year lease agreement. Mr. Galbreath agreed to lease his one-half interest in both parcels to Mr. Harris and his wife for $1,077.33 per month or seven percent of monthly gross receipts, whichever was greater.

On 21 February 1979, an amendment to the ten-year lease was entered into by the parties. The amendment purported to do two things; one, defer rent accrued and owed by the defendants to the plaintiff, and two, extend the lease an additional two years.

The amendment to the lease provides in pertinent part as follows:

> 1.] The rent provided for Parcel 1, 405 Northcrest Drive, more particularly described in said lease, for a two-year period commencing March 1, 1979 and ending February 29, 1980,

> is deferred until the expiration of said lease on the 31st day of March, 1987 and the term of said lease is hereby extended for an additional two years, or until the 31st day of March, 1989, with interest of $700, payable of [sic] the 1st day of April, 1979 and a like amount of the 1st day of April, 1980. [Emphasis added]

There is a patent ambiguity in the amendment. It is unclear whether the amendment defers payment of the rent accrued over a one or two year period.

Mr. Harris and his wife paid rent to Mr. Galbreath from the inception of the lease on 29 March 1977 through February 1979. Then, in accordance with the 21 February 1979 amendment, Mr. Harris and his wife discontinued rent payments to Mr. Galbreath.

On 15 October 1980, the premises were, by agreement of the parties, leased to a third party. At this point

Mr. Harris and his wife had not paid rent to Mr. Galbreath for a period of nineteen months. The parties agree that the lease and amended lease terminated when the premises were leased to the third party.

Subsequently, the parties divided the two parcels of property between them, with Mr. Galbreath receiving title to one parcel and Mr. Harris and his wife receiving title to the other.

Mr. Harris and his wife insist that with the property distribution and the lease to the third party resulting in termination of the lease between Mr. Galbreath and Mr. Harris, all obligations between the parties were terminated, including the outstanding accrued rent.

Mr. Galbreath argues that past rent

indebtedness was not forgiven and that the nineteen months' unpaid rent became due with the expiration of the period agreed upon by the parties on 31 March 1987.

Both Mr. Galbreath and the Harrises moved for summary judgment. The trial court concluded that the lease and amendment to the lease were terminated by agreement of the parties in 1980. The trial court implicitly found that the obligation to pay the nineteen months' unpaid rent also terminated and granted Mr. Harris' and his wife's motion for summary judgment.

The single issue presented by the plaintiff is: "Was the Trial Judge in error in holding that the defendant tenant was not liable for rent that had already accrued but not paid upon agreed

termination of the lease."

Summary judgment is appropriate when there is no dispute as to material facts. Citizens Bank & Trust Co. v. Hardaway, 724 S.W.2d 352, 354 (Tenn. App. 1986). The fact that each party has sought summary judgment, both contending that no genuine issue of material facts exist, does not require the conclusion that no such factual issue exists. Scarboro v. Travelers Ins. Co., 91 F.R.D. 21, 22 (E.D. Tenn. 1908).

Rent is the "[c]onsideration paid for use or occupation of property." Black's Law Dictionary, 1461 (Rev. 4th ed. 1968).

The simple termination of a lease does not normally excuse rent unpaid before termination.

There is a distinction between

rents "to accrue" and "accrued rents." 49 Am.Jur.2d Landlord & Tenant §515 (1970). "Generally, liability for future rent under a lease is extinguished by cancellation of the lease, as where the lease is cancelled in legal proceedings or by mutual agreement of the parties. However, the tenant remains liable for rent due or accruing before the cancellation becomes effective." 52 C.J.S. Landlord & Tenant §491 (1968) (footnotes omitted).

There is a factual dispute regarding the intention of the parties. Mr. Harris and his wife insist that it was the intention of the parties that the accrued rent terminated. Mr. Galbreath insists that the accrued rent did not terminate and that Mr. Harris and his wife had simply failed to pay

the outstanding rent when it became due in 1987.

There is therefore under the record before us a factual dispute regarding whether the parties came to an agreement releasing Mr. Harris and his wife from their obligation to pay the accrued rent. Since there is a dispute regarding a material fact, summary judgment is not appropriate.

Mr. Harris and his wife insist that in any event the statute of limitations has run since the lease was terminated in 1980 and suit was not brought until 19 August 1988.

The amendment to the lease provided that the accrued rent was deferred until 31 March 1987. We find nothing in the record to show otherwise. Therefore, under the record before us at this time,

Mr. Galbreath's suit is not barred by the statute of limitations set forth in Tenn. Code Ann. §28-3-109.

Summary judgment was not appropriate. The judgment of the trial court is therefore reversed and the cause remanded for further necessary proceedings and the collection of costs which are assesed to the defendants.

/s/ SAMUEL L. LEWIS, JUDGE

CONCUR:

/s/ HENRY F. TODD, Presiding Judge

/s/ BEN H. CANTRELL, Judge

APPENDIX B

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

NO. 01-A-01-9006-CH-00202
DAVIDSON EQUITY

CHARLES GALBREATH
Plaintiff-Appellant

v.

ROBERT C. HARRIS and wife
FRANCES A. HARRIS
Defendants-Appellees

OPINION
[Filed Nov. 7, 1990]

This is an appeal by plaintiff Charles Galbreath from the trial court's dismissal of his complaint in which he sought to recover rent under a lease.

The pertinent facts are as follows:

Plaintiff and defendants jointly owned two parcels of real property, one

located on Northcrest Drive and the other on Eighth Avenue South, both in Davidson County, Tennessee.

On 29 March, 1977, the parties entered into a lease whereby plaintiff leased his one-half interest in each of the two parcels to defendants for the sum of $1,077.33 per month.

In August 1977, defendants purchased plaintiff's one-half interest in the Eighth Avenue parcel for $42,000.

In February 1979, because of financial problems, the parties agreed to amend the 29 March 1977 lease as follows:

> 1.] The rent provided for Parcel 1, 405 Northcrest Drive, more particularly described in said lease, for a two-year period commencing March 1, 1979 and ending February 29, 1980, is deferred until the expiration of said lease on the 31st day of March, 1987 and the

> term of said lease is hereby extended for an additional two years, or until the 31st day of March, 1989, with interest of $700. payable of [sic] the 1st day of April, 1979 and a like amount on the 1st day of April, 1980.
>
> 2.] The lease shall have, and is hereby given by lessor, an option to purchase the lessor's 1/2 undivided interest in the leased premises at anytime prior to March 1, 1984 for $50,000 and upon exercise of said option all obligations under the lease shall cease and become null and void.

Defendants paid rent to plaintiff from the inception of the lease through February 1979. Then, in accordance with the February 1979 amendment, defendants discontinued rent payments.

The rent set forth in the February 1979 lease of "$1,077.33 or 7% of monthly gross receipts whichever is greater" was for the rental of plaintiff's one-half interest in both

the Eighth Avenue and 405 Northcrest Drive parcels.

Plaintiff admits that after August 1977 when defendants purchased plaintiff's one-half interest in the Eighth Avenue parcel, defendants ceased to be liable to plaintiff for rent on the Eighth Avenue parcel because defendants "would not charge [themselves] rent."

Plaintiff's admission is in keeping with the language of the amendment.

In June 1980, the parties agreed to sever their relationship insofar as ownership of the Northcrest Drive parcel was concerned. Defendants conveyed their one-half interest in the Northcrest Drive parcel to plaintiff for the sum of $42,000. In doing so, defendants "gave up" a credit of $416.66

per month for twelve months.

After the parties severed their relationship, plaintiff leased his Northcrest Drive parcel to National Pride Car Wash and defendants leased their Eighth Avenue parcel to National Pride. The parties agreed that as of the date of National Pride's lease the lease between them terminated.

It is plaintiff's insistence that he is entitled to rent for the nineteen months that defendants occupied the premises, i.e., from 21 February 1979 to 15 October 1980 when the premises were leased to National Pride.

Defendants insist that it was the intention of the parties that with the conveyance to plaintiff and the lease to National Pride all obligations between the parties were terminated.

The principal question is whether nineteen months rental payments had accrued when the lease was cancelled.

The trial court found as follows:

> In [February] 1979 the parties amended the lease. Although there is an ambiguity in the amendment, the parties agree in their testimony that the intent was to impose a two year moratorium on the payment of rent. The lease was cancelled during that two year period. There was thus no accrued rent when the lease was cancelled.
>
> Moreover, even if the rent had accrued, there is corroborating evidence to support the defendants' contention that the 1980 transaction forever ended the parties' relationship and cancelled all obligations. The defendants gave up valuable rights under the lease.
>
> Finally, even if the plaintiff had established that he is entitled to recover rent, he has not proven the amount of rent due.

Plaintiff's first issue is whether the trial court erred in finding that

"the defendant tenants were not liable for rent that had accrued but not paid upon agreed termination of the lease."

We first note that the trial court found that the rent had not accrued but that, even if it had, it was the agreement of the parties that the 1980 transaction ended the parties relationship and cancelled all obligations and that there was a valuable consideration for this agreement.

Plaintiff insists that res judicata applies in this case and that the trial court was in error in holding that the nineteen months' rent had not accrued.

This is the second appeal of this case. See Galbreath v. Harris, 779 S.W.2d 392 (Tenn. App. 1989). The issue in the first appeal was whether the

trial court erred in granting defendants' motion for summary judgment. We held that the trial court did err, because there was a "factual dispute" regarding the intention of the parties.

We did state that there was a disagreement between the parties regarding whether the defendants, under the evidence in the record at that time, had been released from their "obligation to pay the accrued rent."

A plea of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. Lillard v.

Yellow Mfg. Acceptance Corp., 195 Tenn. 686, 696, 263 S.W.2d 520, 524 (1953).

We held that it was error to grant defendants' motion for summary judgment under the record at that time and, therefore, reversed the trial court. In effect, we denied the motion for summary judgment.

"A denial of summary judgment indicates that the moving party has failed to establish that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law; a trial therefore is necessary." Williamson County Broadcasting Co. v. Williamson County Bd. of Educ., 549 S.W.2d 371, 372-373 (Tenn. 1977) (citation omitted).

A denial of a motion for summary judgment is not an adjudication upon the

merits and is not conclusive of rights, questions and facts in issue.

Plaintiff's first issue is without merit.

By his second issue, plaintiff says the trial court erred in finding that "the parties agreed that the debt was discharged."

There is conflicting evidence in the record. However, there is evidence from which the court could find: (1) that it was the intention of the parties that defendants would convey the Northcrest parcel to plaintiff "to dissolve the partnership," i.e., the joint ownership of the Northcrest property; (2) that the parties intended their business relationship would terminate; and (3) that in order to do so defendants gave up their rights to

"purchase the property" and their option "to continue under the lease." Defendants also gave up the credit of $416.66 per month for twelve months, as well as "any rights" they had under "any agreement" with plaintiff.

The findings of the trial court which are dependent upon determining the credibility of witnesses are entitled to great weight. Town of Alamo v. Forcum-James Co., 205 Tenn. 478, 483, 327 S.W.2d 47, 49 (1959). The reason for this is that the trial judge alone has the opportunity to observe the manner and demeanor of the witness while testifying. On an issue which hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the

oral testimony of witnesses which contradict the trial court's findings. Tennessee Valley Kaolin Corp. v. Perry, 526 S.W.2d 488, 490 (Tenn. App. 1974).

The appellant on appeal has the burden of showing that the evidence preponderates against the findings of the trial court. Capital City Bank v. Baker, 59 Tenn. App. 477, 493, 442 S.W.2d 259, 266 (1969). Here, the plaintiff-appellant has failed to carry that burden.

Plaintiff also argues that defendant Robert Harris' testimony regarding the termination varies the terms of a written contract and "parol evidence is not admissible at law to vary the terms of a written contract." American Fruit Growers, Inc. v. Hawkinson, 21 Tenn. App. 127, 135, 106

S.W.2d 564, 569 (1937). We agree that this is the general rule. However, here the defendants' testimony was not an attempt to alter or vary the terms of the written contract. Rather, it was to show there had been a modification in 1980 of the February 1979 amendment by consent of the parties.

> [B]y the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, altogether to waive, dissolve, or abandon it, or to add to, change or modify it, or vary or qualify its terms, and thus make it a new one. The reason for this is that simple contracts, whether written or otherwise, are, in the absence of a statute changing the rule, of the same dignity in contemplation of law, and therefore the written contract may be changed, modified or waived in whole or in part by a subsequent one, express, written, oral, or implied. It has been said that a subsequent parol modification of a written contract upon a new consideration constitutes a

new agreement.

17 Am.Jur.2d Contracts §466 (1964).

After a written contract is made, it may be modified by the express words of the parties in writing, as well as by parol. Co-operative Stores Co. v. United States Fidelity Guaranty Co., 137 Tenn. 609, 622, 195 S.W. 177, 180 (1917).

Whether written or oral, modifications of written contracts must be with the consent of both parties. V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., Inc., 595 S.W.2d 474, 482 (Tenn. 1980).

The trial court found, and the evidence does not preponderate against that finding, that there was a modification of the contract and that this modification was with the consent

of both parties. The court properly allowed the parol evidence to show the modification.

That issue is without merit.

Because of our holding in issues one and two, we pretermit plaintiff's third issue regarding damages.

The judgment of the trial court is affirmed with costs assessed to the plaintiff and the cause remanded to the trial court for the collection of costs and any further necessary proceedings.

/s/ SAMUEL L. LEWIS, JUDGE

CONCUR:

/s/ HENRY F. TODD, Presiding Judge

/s/ BEN H. CANTRELL, Judge

APPENDIX C

SUPREME COURT OF TENNESSEE
AT NASHVILLE

NO.
DAVIDSON EQUITY

CHARLES GALBREATH
Plaintiff-Appellant

v.

ROBERT C. HARRIS and wife
FRANCES A. HARRIS
Defendants-Appellees

ORDER
[Filed April 8, 1991]

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM